Supreme Court, U.S.
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No. 10-10-89

IN THE

Supreme Court of the United States

HOWARD BLOOMGARDEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, following *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), a certificate of appealability should be granted to permit a defendant to challenge his federal guilty plea under 28 U.S.C. § 2255 if he was, according to a judicial finding, unconstitutionally misled by his trial counsel about the collateral consequences of an allocution that may subject him to the death penalty.

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HOWARD BLOOMGARDEN,

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OPINIONS BELOW

The opinion and mandate of the Court of Appeals (Pet. App. A, p. 1a, *infra*) is not reported. The opinion of the district court (Pet. App. B, pp. 3a-20a, *infra*) is not reported.

JURISDICTION

The decision or the court of appeals was issued on March 10, 2010 (Pet. App. A, p. 2a, *infra*). A timely petition for rehearing and rehearing *en banc* was denied on April 12, 2010 (Pet. App. C, p. 21, *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Introduction

Petitioner is a 42-year-old man who is currently serving a 405-month federal prison sentence pursuant to a guilty plea he entered in 1996 in the Eastern District of New York. E.D.N.Y. Crim No. 96-182 (ARR). Following his transfer to California, he is awaiting trial in the California courts on homicide charges that may result in the death penalty. On June 13, 2007, the Special Circumstances Committee of the State of California authorized imposition of the death penalty in petitioner's case. Pet. App. D, p. 22a, *infra*. The legal issue presented at this juncture is whether the Second Circuit should hear and decide petitioner's appeal from the district court's refusal to consider his constitutional ineffective-assistance-of-counsel claim For reasons set out in this Petition, there is a substantial legal issue regarding the validity of his guilty plea that should be decided now and not deferred until this case re-appears on this Court's docket as a death-penalty case justifying the extraordinary scrutiny given to such cases by the Court.

2. Bloomgarden Pleads Guilty and Is Sentenced in a Federal Court.

On July 1, 1996, Bloomgarden pleaded guilty in the United States District Court for the Eastern District of New York to interstate travel in aid of racketeering relating to marijuana trafficking, extortion, and receipt of stolen art. E.D.N.Y. Crim. No. 96-182 (ARR). The conspiracy also involved the murder in California of two individuals, Peter Kovach and Ted Gould. *See United States v. Friedman*, 300 F.3d 111 (2d Cir. 2002). On July 19, 1998, Bloomgarden was sentenced to serve 405 months in federal custody.

3. Bloomgarden Learns That His Lawyer Has Blundered.

Bloomgarden subsequently learned that the attorney who represented him in the Eastern District of New York (Gerald Shargel, Esq.) had not provided effective assistance of counsel because he failed to advise Bloomgarden that his guilty plea could be used against him in a California murder trial. The attorney drafted an allocution made by Bloomgarden when he pleaded guilty that was, in essence, a confession to participation in the murder of two individuals in California. An arrest warrant on the homicide charges had been issued against Bloomgarden in March 1996, and Bloomgarden's New York attorney knew that California was seeking to try Bloomgarden on homicide charges carrying a death penalty.

4. Bloomgarden Unsuccessfully Seeks Relief Under 28 U.S.C. § 2255.

On June 29, 1999, petitioner initiated this proceeding in the Eastern District of New York with the filing of a motion to vacate his sentence under 28 U.S.C. § 2255. Following briefing before the district judge who had imposed the sentence, his Section 2255 petition was denied on November 14, 2001, on the ground that his petition "failed to make a substantial showing of the denial of a constitutional right." Pet. App. E, pp. 42a-43a, *infra*. Although a timely notice of appeal was filed and Bloomgarden moved for a certificate of appealability, the court of appeals denied the certificate and dismissed the appeal on August 12, 2002, on the ground that it failed to make a "substantial showing of the denial of a constitutional right."

5. Bloomgarden Is Delivered to California.

After his federal plea and sentence, Bloomgarden was assigned to the United States Medical Center in Springfield, Missouri, for psychiatric evaluation and treatment. The State of Florida then lodged a detainer under the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, requesting custody of Bloomgarden on kidnapping charges. He was transferred to Florida on January 25, 1999. On January 28, 1999, a California chief of police sent a letter to the Federal Medical Center requesting Bloomgarden's custody under the March 1996 homicide warrant.

Bloomgarden was returned to federal custody by Florida on January 9, 2005, after he had cooperated in a Florida prosecution. On May 5, 2005 – without being afforded rights guaranteed by the Interstate Agreement on Detainers – he was physically transferred to California, where he is now awaiting trial on first-degree murder charges. Presently pending in the Court of Appeals for the Ninth Circuit is an appeal from the ruling of a magistrate judge in California (approved by a district court) denying his challenge in a habeas corpus petition to the transfer to California. *Bloomgarden v. Bureau of Prisons and State of California*, 9th Cir. No. 09-56670.

6. The District Attorney Moves To Admit Bloomgarden's Allocution.

In the state-court homicide prosecution, the California District Attorney moved, in a pretrial *in limine* motion, for the admission at Bloomgarden's trial of the self-incriminatory statements he had made during his guilty plea in the Eastern District of New York. A five-day hearing was held between June and September 2006 on his motion before Judge Curtis B. Rappe of the Los Angeles Superior Court. Mr. Shargel, his principal associate, and two other attorneys testified during the hearing, as did Bloomgarden. Shargel testified that he had not discussed the possible "repercussions" in California of the federal-court plea with Bloomgarden because he believed that there was a "good argument" that a prosecution in California would constitute double jeopardy. He candidly conceded:

> I did not advise Howard Bloomgarden that . . . well if everything failed and California decided to go forward then there would be a trial in Los Angeles and at the trial in Los Angeles the plea allocution would be admitted against [him] in that case. I'm prepared to say absolutely not.

Shargel's associate corroborated this testimony, as did the appellate specialist who was working with Shargel. Michael Burt, an attorney with expertise in California death-penalty cases, testified that the New York lawyers' representation of Bloomgarden fell below the standard of reasonable care because

> in a situation where the district attorney in effect is not returning phone calls and where the U.S. attorney in New York is telling them that the California authorities don't want to be part of any package plea bargain they had an obligation to investigate further what the situation was in terms of the likelihood that any California prosecutor would have been satisfied with a 33-year sentence on a case involving two homicides and special circumstances.

Burt also concluded that it was unreasonable for Shargel not to consult with an attorney "who knew anything about California practice." In Burt's view, Shargel failed to provide effective assistance by failing to explain to Bloomgarden that (1) California

could use the federal-court allocution against Bloomgarden, (2) Bloomgarden was essentially pleading guilty to California aggravated kidnapping and capital murder charges with special circumstances, and (3) the California charges guaranteed a minimum prison sentence of life without parole (which Bloomgarden sought to avoid by pleading guilty in the Eastern District of New York) and possible execution.

7. The California Court Finds That There Was Ineffective Assistance.

On September 1, 2006, Judge Rappe concluded that Shargel had denied effective assistance of counsel to Bloomgarden by "woefully fail[ing] to investigate and adequately explain to Mr. Bloomgarden the consequences of going into court and pleading guilty and making the allocution that he did in the way that he did it." The judge barred introduction of the allocution in the prosecution's case-in-chief. Under California law, however, Bloomgarden's statement when he entered his plea may be used for impeachment if Bloomgarden takes the stand. *People v. Demetrulias*, 39 Cal.4th 1, 29, 137 P.3d 229, 249 (2007); *People v. Peevy*, 17 Cal.4th 1184, 1193, 953 P.2d 1212, 1217 (1998).. This ruling effectively bars Bloomgarden from testifying in his own defense.

8. Bloomgarden Seeks To Reopen His Section 2255 Motion.

Following the ruling of the California court that he had been unconstitutionally denied effective assistance of counsel, Bloomgarden attempted to reopen the Section 2255 proceeding he had initiated in the Eastern District of New York. On November 4, 2008, retained counsel filed a motion to reopen the case under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Appended to the motion were the relevant testimony and the decision in the California Superior Court. After briefing on the Rule 60(b)(6) motion, the district judge entered the Opinion and Order that is the subject of this Petition.

9. The District Court Denies the Rule 60(b)(6) Motion.

The district judge denied Bloomgarden's motion. She declared that, notwithstanding the six-year delay between the court of appeals' mandate following the denial of a certificate of appealability in August 2002 and the filing of the Rule 60(b)(6) motion, she would consider the motion on its merits. Rather than considering the effect of Shargel's original blunder, the district court construed petitioner's claim as a challenge to the effectiveness of Bloomgarden's habeas counsel for relegating to a footnote his claim that Shargel provided ineffective assistance of counsel. She then ruled that petitioner had made an inadequate showing that his habeas attorney was ineffective. *See* Pet. App. B, p. 20a. On similar reasoning, the district court held that the ruling of the California Superior Court judge that

Shargel had provided ineffective assistance of counsel "has no bearing on whether or not his habeas counsel's performance was legally deficient." Pet. App. B, p. 18a, *infra*. The district judge found that Bloomgarden's habeas counsel had not "constructively abandoned his habeas petition" (p. Pet. App. B, 19a) and, on this ground, dismissed the petition without reaching the merits of the claim that Shargel's blunder deprived Bloomgarden of his constitutional right and entitled him to have the guilty plea vacated.

10. The District Court and Court of Appeals Deny an Appeal.

The district court also denied a certificate of appealability on the ground that the claim asserted by the petitioner was not a "substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2). The court of appeals, through one Circuit Judge and a District Judge sitting by designation, agreed with the denial of a certificate of appealability and dismissed the appeal in a brief order. Pet. App. A, p. 2a, *infra*.

REASONS FOR GRANTING THE WRIT

1. **Conflict with *Padilla*** – This Court's recent decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), established beyond any doubt that Bloomgarden was denied his constitutional right to the effective assistance of counsel when attorney Shargel gave him highly damaging incorrect advice on the "collateral consequences" of his guilty plea in the Eastern District of New York. The prejudice to Bloomgarden from this advice is manifest in light of California's intention to utilize Bloomgarden's virtual confession to try him on murder charges and its intention to seek the death penalty.

2. **Conflict with *Slack v. McDaniel*** – Moreover, the Second Circuit's denial of a certificate of appealability in these circumstances conflicts with the standard articulated by this Court in *Slack v. McDaniel*, 529 U.S. 473 (2000), for the issuance of such certificates. In light of the ruling of the California Superior Court there can hardly be any doubt that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 U.S. at 484.

3. **Conflict with *Liljeberg* and *Klapprott*** – The extraordinary circumstances of this case satisfy the "broad authority" conferred by Federal Rule of Civil Procedure 60(b)(6) to vacate a judgment for "any other reason that justifies relief." Compare *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847,

863-864 (1988); *Klapprott v. United States*, 335 U.S. 601, 613-614 (1949). Under these decisions of this Court it is, at the very least, "debatable" whether the district judge's Rule 60(b)(6) determination was correct.

4. **Comparable to *Miller-El*** – Moreover, the present posture of this case is strikingly similar to the procedural status of *Miller-El v. Cockrell*, 537 U.S. 322 (2003), when the petitioner's habeas corpus petition first appeared on this Court's docket. At that juncture in that capital-punishment case, this Court reversed the refusal to grant a certificate of appealability on the ground that "the COA inquiry asks only if the District Court's decision was debatable." 537 U.S. at 347. After that reversal and the lower court's rejection of the petitioner's appeal, the case appeared again on this Court's docket and resulted in a reversal of the denial of habeas corpus relief. *Miller-El v. Dretke*, 545 U.S. 231 (2005).

5. **Comparable to *Magwood*** – Finally, the decision of the court of appeals summarily to affirm the district court's denial of Bloomgarden's Section 2255 motion on highly dubious procedural grounds is comparable to the decision of the Eleventh Circuit recently reversed by this Court in another capital-punishment case – *Magwood v. Patterson*, No. 09-158, decided June 24, 2010. When Bloomgarden first presented his ineffective-assistance-of-counsel claim to the sentencing judge in the Eastern District of New York and when it was denied in 2001, he was not yet in custody in California. The prospect that his allocution would be used against him in a trial in which the death penalty would be sought was not yet

known. Nor had any judicial officer determined that his attorney had violated the standards required of counsel. Indeed, there had not yet been any evidentiary hearing on this subject. There is, therefore, no policy reason to preclude presentation of these highly extraordinary circumstances in a Rule 60(b)(6) motion, just as in *Magwood* there was no policy justification to bar the petitioner's second habeas corpus petition.

Nor should this Court assume that Bloomgarden will be permitted to raise his meritorious ineffective-assistance-of-counsel claim in a second motion under Section 2255. The sentencing judge in his case (Allyne R. Ross, U.S.D.J.) has already held that, notwithstanding the concurring opinion of Justice Alito (joined by the Chief Justice) that characterized the majority opinion in *Padilla v. Kentucky* as a "dramatic departure from precedent" that reversed "longstanding and unanimous position of the federal courts" (130 S. Ct. at 1487-1488), this Court's ruling in *Padilla* is not a "newly recognized right." *Gacko v. United States*, 2010 WL 2076020 (E.D.N.Y., May 20, 2010). Hence it can be anticipated that if this Court does not act on this petition, a second Section 2255 motion based on *Padilla* may be denied on procedural grounds and will result in extended procedural litigation.

CONCLUSION

Before a trial is held in California, before Bloomgarden's allocution is admitted if he chooses to take the stand or he is unable to testify in his own defense, and before the case re-appears on this Court's docket as a capital-punishment case, the Court should grant certiorari, vacate the order of the court of appeals that denied Bloomgarden a certificate of appealability, and remand for further consideration in light of *Padilla v. Kentucky*. *See Santos-Sanchez v. United States*, 130 S. Ct. 2340 (2010). Such an order will conserve judicial resources and will probably result in a more efficient and just resolution of the outstanding criminal charges.

Respectfully submitted,

July 12, 2010

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APPENDICES

APPENDICES

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Appendix B - *Opinion and Order of the United States District Court for the Eastern District of New York dated July 16, 2009*..... 3a

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APPENDIX A

MANDATE

United States Court of Appeals
for the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of March, two thousand ten,

Present:

Debra Ann Livingston,*
Circuit Judge,
Kimba M. Wood,**
District Judge.

Howard Bloomgarden,
Movant-Appellant,

v. 09-3853-pr

United States of America,
Respondent-Appellee.

Appellant, *pro se*, moves for an extension of time to file a certificate of appealability ("COA") and requests that we issue a court order allowing paralegal visits. Upon due consideration, it is hereby ORDERED that, construing the motion for an extension of time as a motion for a COA

challenging the district court's denial of his Fed. R. Civ. P. 60(b) motion in his habeas proceeding, the motions are DENIED and the appeal is DISMISSED because Appellant has failed to show that: "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60 motion and, (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the Rule 60 motion, states a valid claim of the denial of a constitutional right." *Kellogg v. Strack,* 269 F.3d 100, 104 (2d Cir. 2001)(*per curiam*).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/

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*The Honorable Rosemary S. Pooler, originally assigned to this panel, did not participate in the consideration of this appeal. The remaining two members of the panel, who are in agreement, have determined this matter. *See* Second Circuit Internal Operating Procedure E(b); 28 U.S.C. § 46(d); *United States v. Desimone,* 140 F.3d 457 (2d Cir. 1998).

**Kimba M. Wood, Senior Judge of the United States District of New York, sitting by designation.

A True Copy
/s/
Catherine O'Hagan Wolfe, Clerk

MANDATE ISSUED ON 3/10/10

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HOWARD BLOOMGARDEN, *Petitioner*	99 CV 3676 (ARR) NOT FOR PUBLICATION
-against-	
UNITED STATES OF AMERICA, *Respondent.*	OPINION AND ORDER

ROSS, United States District Judge:

Habeas petitioner, Howard Bloomgarden ("Bloomgarden"), moves for reconsideration of this court's Opinion and Order denying his motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the motion is denied.

BACKGROUND

For the purposes of this motion, familiarity with the underlying facts is presumed and, therefore, only a brief recitation is necessary. On July 1, 1996, Bloomgarden pled guilty before me to conspiracy to distribute and possess with the intent to distribute marijuana, receipt of stolen art, conspiracy to use extortionate means to collect and attempt to collect an extension of credit, conspiracy to commit robbery, and interstate travel in aid of racketeering resulting in the kidnapping and murder in California of Peter Kovach and Theodore Gould. He was thereafter

sentenced to a total of 405 months incarceration. During the allocution, he acknowledged that he obtained and distributed marijuana to various places throughout the United States, received stolen artwork that he knew to be stolen and worth more than $5,000, intended to assist an extortion, and was involved in a robbery conspiracy that he knew would involve actual or threatened force or violence. Plea Tr. at 23-28. He also acknowledged that he provided the financing for two interstate kidnappings and "approved of" the ensuing murders of Kovach and Gould. Id. at 28.

On June 29, 1999, Bloomgarden filed a petition pursuant to 28 U.S.C. § 2255 to vacate his guilty plea and conviction, alleging that he was unable to participate in the preparation for his trial and he did not enter his guilty plea knowingly, intelligently and voluntarily because the Bureau of Prisons denied him Ritalin to treat his Attention Deficit Hyperactivity Disorder ("ADHD"). Pet. Notice of Motion, Ex. E at 5. Petitioner also contended in his initial petition that he was denied effective assistance of counsel when his "lawyers did not advise [him] that [his] plea of guilty could be used against [him] in other jurisdictions." Id. Habeas counsel, in his lengthy subsequent submissions, included neither law nor facts in support of this ground, choosing to brief and adduce evidence concerning only the claim that Bloomgarden involuntarily entered the guilty plea due to his purported ADHD. The only subsequent reference to a claim of ineffective assistance of trial counsel based on failure to advise petitioner of the collateral

consequences of his plea appeared in a footnote in petitioner's reply brief, wherein habeas counsel stated in full:

> In this footnote we call the Court's attention to the original petition signed by Bloomgarden where at page 5 he raises an additional claim of ineffective assistance in that he states his lawyers did not advise of possible collateral consequences of his plea and [this] should also be developed at an evidentiary hearing.

Notice of Mot. Ex. F at 18 n*8. In an Opinion and Order dated November 15, 2001, I denied the petition for habeas relief of all grounds without conducting an evidentiary hearing. Specifically as to the truncated claim of ineffective assistance of counsel for failure to advise Bloomgarden of the collateral consequences of the guilty plea allocution, I explained:

> [a]lthough petitioner raised this ground in his petition, he did not provide details as to this claim in his affidavit, nor did his attorney adduce any argument in his Memorandum in Support of the Petition or in his Reply Memorandum. Petitioner's attorney simply references this claim in footnote 8 of his Reply and urges the court to explore the claim in an evidentiary hearing. As discussed below, the

> petitioner is not entitled to an evidentiary hearing as of right, and it is not the court's responsibility to presume facts that, if proven, would warrant habeas relief. Although petitioner has had since July 29, 1999 to submit information to support his claim, he has failed even to identify its basis. The conclusory allegation does not warrant habeas relief, much less an evidentiary hearing.

Notice of Mot. Ex. H at 10 n*6. I also declined to issue a certificate of appealability since Bloomgarden failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2255(c)(2) (1996). Petitioner thereafter moved in the Second Circuit for a certificate of appealability, which was denied on August 12, 2002. On November 4, 2008, nearly six years after the denial of his petition for habeas relief, Bloomgarden now moves pursuant to Fed. R. Civ. P. 60(b)(6) for reconsideration of that Opinion and Order.

On March 1, 1996, before petitioner pled guilty in the Eastern District of New York, state prosecutors in California had filed a capital complaint against Bloomgarden in connection with the murders of Kovach and Gould. See Mem. In Support of Mot. To Reopen Howard Bloomgarden's 28 U.S.C. §2255 Proceeding Pursuant to Fed. R. Civ. P. 60(b)(6) (hereinafter "Pet. Mem.") at 2. It was not until May 2005, however, that petitioner was transferred to California to face those charges. Id. at 5. During

pretrial motion practice, the State moved, *in limine*, to admit in its case-in-chief petitioner's plea allocution before this court. Id. Petitioner opposed the motion, contending that the allocution was the result of ineffective assistance of trial counsel because his lawyers "failed to explain [that his words] could be used against him in the parallel California capital case." Id. Superior Court Judge Curtis Rappe thereafter presided over an extensive five day evidentiary hearing, wherein he heard testimony from, among others, petitioner's attorneys Gerald Shargel, Jeffrey Lichtman, Michael Ross, and Judd Berstein; Michael Burt, a expert on death penalty litigation; and petitioner.

On September 1, 2006, Judge Rappe ruled from the bench that petitioner's counsel were constitutionally deficient because they failed to inform petitioner that his allocution was an admission to all elements of capital murder in California, and that those words could be used against him in a subsequent state prosecution. Id. at 9. Specifically, Judge Rappe stated that the attorneys "woefully failed to investigate and adequately explain to Bloomgarden the consequences of going into open court and pleading guilty and making the allocution that he did in the way that he did it." Id. at 10. Judge Rappe also found prejudice. Id. In turn, he ruled that the government could not use the allocution in its case-in-chief. Id. If petitioner decided to testify, however, the government would be permitted to introduce the allocution for impeachment purposes. Id. On June 13, 2007, the Special Circumstances Committee of

the Los Angeles County District Attorney's Office informed petitioner that it had authorized the death penalty in his case; and he is currently awaiting trial.

This motion for reconsideration followed. In his motion, petitioner seeks relief in two stages. First he urges me to reconsider my 2001 Opinion and Order denying his motion to vacate his guilty plea, arguing that he received ineffective assistance of habeas counsel. If I re-open Bloomgarden's petition, he next argues that I should vacate his guilty plea because "trial counsel negligently failed to explain [to him] that [his allocution] was admissible capital murder evidence in California." Pet. Mem. at 17. Because, as discussed below, I conclude that petitioner has failed to demonstrate the extraordinary circumstances that would permit granting Bloomgarden's motion for reconsideration, I decline to reach the merits of his underlying ineffective assistance of trial counsel claim, which is beyond the scope of the Rule 60(b) analysis.

DISCUSSION

A. Standard for Reconsideration

Federal Rule of Civil Procedure 60(b)(6), the omnibus provision, permits a court to relieve a party from a final judgment for "any . . . reason that justifies relief." Fed. R. Civ. P. 60(b)(6).[1] The

[1] Despite the government's protestation that petitioner's motion is untimely, I will review the motion since, unlike subsections (1) through (3), subsection (6) contains no temporal limitation.

standard for granting a motion for reconsideration pursuant to this rule is "strict, and reconsideration will generally be denied." Herschaft v. New York City Campaign Finance Board, 139 F.Supp.2d 282, 283 (E.D.N.Y. 2001). Because "60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." Cent. Vt. PSC v. Herbert, 341 F.3d 186, 190 (2d Cir. 2003)(quoting Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986)). Furthermore, the Second Circuit has repeatedly held that "relief under Rule 60(b) is available with respect to a previous habeas proceeding only when the Rule 60(b) motion attacks the integrity of the habeas proceeding and not the underlying criminal conviction." Harris v. United States, 367 F.3d 74, 77 (2d Cir. 2004)(citing Rodriguez v. Mitchell, 252 F.3d 191 (2d Cir. 2001)(noting that Rule 60(b) motions are not successive petitions within the meaning of 28 U.S.C. § 2244(b) to the extent that the motion is seeking to vacate a federal trial court's ruling dismissing a habeas petition)).

Most significantly for this case, the Second Circuit has ruled that "an attack on the integrity of a previous habeas proceeding using subsection (6) of Rule 60(b) is viable only in extraordinary circumstances, and . . . such circumstances will be particularly rare where the relief sought is

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Rather, the motion must be made "within a reasonable time." Fed. R.Civ. P. 60(b)(c)(1). While this I do not doubt that reasonable jurists could find a six-year delay unreasonable, I decline to do so and will consider the merits of petitioner's Rule 60(b) motion.

predicated on the alleged failures of counsel in a prior habeas petition." Harris, 367 F3d at 77 (internal citation omitted). In articulating this exacting standard, the Second Circuit noted that "habeas petitioners represented by counsel have *no* constitutional right to habeas counsel." Id. at 81 (emphasis in the original). Thus, Rule 60(b) motions attacking the performance of habeas counsel are not reviewed pursuant to the two-pronged ineffective assistance of counsel jurisprudence announced in Strickland v. Washington, 266 U.S. 668 (1984). Id. Rather, in order to prevail on a Rule 60(b)(6) motion predicated upon purported ineffective assistance of habeas counsel, a petitioner must demonstrate that "his lawyer agreed to prosecute a habeas petitioner's case, abandoned, it, and consequently deprived the petitioner of any opportunity to be heard at all." Harris, 367 F.3d at 81. Thus, "a lawyer's failures must be so egregious and profound that they amount to the abandonment of the client's case altogether, either through physical disappearance . . . or constructive disappearance." Id. (internal citations omitted). In reaching this strict standard, the Circuit reasoned that the "[Anti-Terrorism and Effective Death Penalty Act] requires an even more rigorous application of [Rule 60(b)(6)'s] standard, lest Rule 60(b)(6) swallow the procedures that limit successive petitioners." Id.

B. Petitioner's Claim

1. Habeas Counsel Did not "Constructively Abandon" Petitioner

Petitioner contends that I should reopen his 28 U.S.C. § 2255 proceeding on the ground that his habeas counsel constructively abandoned petitioner. Specifically, he notes that in his initial habeas filing before me, he faulted his New York trial counsel for failing to advise him of the collateral consequences of his allocution in any future prosecutions, and he argues that his habeas counsel "inexcusably scrapped that complaint, relegating it to a scant footnote – perfunctory and unelaborated – in a reply brief." Pet. Mem. at 13. This blunder, petitioner concludes, meets Harris's exacting standard for reopening a habeas petition pursuant to Rule 60(b)(6) in that it was tantamount to constructive disappearance of habeas counsel, resulting in what petitioner further characterizes as a refusal of this "Court . . . to address the claim on the merits, robbing [him] of his day in court and denying him a meaningful opportunity to be heard." Id. at 13-14. This argument is not persuasive.

As noted above, in Harris, the Second Circuit enunciated the high bar that must be met for a successful habeas petitioner to secure the reopening of his habeas proceeding under Rule 60(b)(6). The court wrote:

> The integrity of a habeas proceeding cannot be impugned under Rule 60(b)(6) using the [ineffective assistance

> of counsel] standard established in Strickland, 466 U.S. at 687. Instead, a Rule 60(b)(6) movant must show that his lawyer agreed to prosecute a habeas petitioner's case, abandoned it, and consequently deprived the petitioner of any opportunity to be heard at all."

Id. (citations omitted). Turning to the facts of that case, petitioner Harris attached the integrity of his habeas proceeding, urging the Second Circuit to reverse the district court's denial of his motion for reconsideration. Harris, 367 F.3d at 78. Harris contended that he was entitled to relief because his habeas counsel's failure to raise an ineffective assistance of trial counsel claim, predicated upon trial counsel's failure to raise a sentencing issue flagged as potentially meritorious by the trial court, undermined the habeas proceeding and constituted abandonment of petitioner's case. Id. While recognized that an abandonment argument may attack the integrity of a habeas proceeding, and therefore could provide the basis for granting a motion for reconsideration, the Second Circuit ruled that Harris did not meet this burden. The Circuit noted that despite Harris's counsel's omissions, "nothing in the record . . . suggests that [habeas counsel's] performance approached a level of deficiency that could remotely be deemed 'abandonment' and therefore an 'extraordinary circumstance.' In the absence of any extraordinary circumstance under Rule 60(b)(6), we conclude that Harris's Rule 60(b) motion failed in its attack on the integrity of the habeas proceeding. Id. at 82.

Similarly, here, Bloomgarden has adduced no evidence to support the conclusion that his habeas attorney constructively abandoned his case. Petitioner argues that his counsel did not merely ignore or overlook his ineffective assistance of counsel claim, suggesting (correctly) that such negligence would likely not satisfy Harris's strict standard. See Pet. Mem. at 15. Rather, petitioner contends that his counsel "affirmatively aborted a claim," implicitly suggesting that failure to pursue a claim constitutes abandonment of the client. Id. Petitioner, however, offers no evidence to support this conclusory and self-serving assertion. A review of the case history reveals that Bloomgarden's counsel vigorously litigated his habeas petition, undermining petitioner's contrary assertion. Indeed, petitioner's habeas counsel requested at least two extensions to amplify his submissions, attended a status conference, and submitted three status updates to the court. See Bloomgarden v. U.S., 99-CV-3676 Dkt. Nos. 4, 5-8. This is in addition to the lengthy supporting brief, supplemental brief and reply brief authored and submitted by habeas counsel on petitioner's behalf. See Bloomgarden v. U.S., 99-CV-3676 Dkt. Nos. 11, 10, 15. From this record, the court can only conclude that habeas counsel actively participated in the litigation and did not abandon petitioner.

Nor did counsel cause this court, in the context of the habeas proceeding, to refuse to address the claim on the merits or otherwise deny petitioner a meaningful opportunity to be heard. The court directly addressed the claim on the merits, albeit in

a footnote, denying habeas on this ground because the record supplied no evidence to support it, and denying an evidentiary hearing on the issue because no facts had been adduced that, if proven true, would warrant relief on this ground. See Notice of Mot. Ex. H at 10 n*6.

The authorities petitioner cites do not support his contention.[2] For example, in U.S. v. Cirami, the Second Circuit granted the appellants' Rule 60(b) motion, which sought relief from an unopposed, adverse summary judgment ruling that resulted in a $271,000 judgment against appellants. 563 F.2d 26, 29 (2d Cir. 1997). The Circuit remanded the case for an evidentiary hearing, opining that Cirami was a unique case in which "defendants' attorney . . . was allegedly suffering from a psychological disorder which led him to neglect almost completely his clients' business while at the same time assuring them that he was attending to it." Id. at 34.

The Cirami facts are readily distinguishable from the case at bar. Here, petitioner has adduced no evidence to suggest that his habeas attorney suffered from an illness – physical or mental – that prevented him from fulfilling his obligations. Also, in Cirami, the appellants' attorney abandoned his clients entirely. Bloomgarden's habeas counsel, on the other hand, did not wholly abandon petitioner; rather, he extensively pursued a portion of petitioner's claim, forcefully arguing that petitioner entered his guilty

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[2] Petitioner does not argue that his habeas counsel completely, physically disappeared. See Vindigni v. Meyer, 441 F.2d 376 (2d Cir. 1971).

plea involuntarily because he suffered from unmedicated ADHD. Although petitioner opined in his testimony before Judge Rappe that his habeas counsel's concern about meeting this court's deadlines resulted in counsel's failure to "build the proper evidence" that might have prompted this court to grant an evidentiary hearing, Tr. 666, 677-78, petitioner does not contend that he even raised these concerns with counsel or requested that counsel further address the issue in submissions.[3] Thus, unlike the appellants in Cirami, petitioner has offered no evidence suggesting this his habeas counsel's failure to pursue the collateral consequences aspect of his claim was due to anything other than a tactical judgment or, at worst, mere negligence. Cf. Harris, 367 F.3d 81 ("There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client.") (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962)). Mere negligence, however, does not satisfy Rule 60(b)(6)'s exacting standard. Cf. Cirami, 563 F2d. at 34 (noting that the deficient attorney's default "was not the result of his having taken on too many cases to give proper attention to this one," but was rather the result of a "mental illness which manifested itself to his clients only after they had relied on him for months.'" Tarascio v. U.S., 198 F.R.D. 321, 234 (D.Conn. 2000)("Absent a showing of extraordinary circumstances, as opposed to a mere

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[3] Indeed, it was not until November 2008, when Bloomgarden filed the instant motion for reconsideration, that petitioner informed me for the first time that he was at all dissatisfied with his habeas counsel's representation.

failure by counsel to raise certain potential arguments in the habeas petition, [the petitioner's] claim that his counsel's incompetence entitled him to relief from judgment under Rule 60(b)(6) fails."). Thus, petitioner's claim falls outside the Second Circuit's narrow holding in Cirami.

Nor does petitioner's repeated citation to Pichardo v. Ashcroft alter the analysis. In Pichardo, the petitioner, an alien, was deported from the United States based upon serial DUI convictions after a district court denied his petition for habeas relief. 374 F.3d 46, 49-50 (2d Cir. 2004). Pichardo thereafter filed a motion for reconsideration, attacking the integrity of his habeas proceeding on the ground that his habeas counsel failed to bring to the court's attention an intervening Second Circuit case, which held that a DUI conviction was not a crime of violence upon which deportation could be based under 18 U.S.C. § 16(b). Id. at 50. As characterized by the Circuit, petitioner's habeas counsel had instead "raised two specious arguments." Id. The Second Circuit reversed the district court's denial of the motion for reconsideration, ruling that "manifest injustice" mandated a "meaningful and substantive review of Pichardo's case" because at the time he was deported, there was a "dramatic change to governing law, a fact that existed at the time his habeas petition was pending before the district court." Id. at 56.

Here, unlike Pichardo, where the change in law overlooked in his habeas proceeding eliminated the

very basis of Pichardo's deportation, there has been no change in governing law that the parties overlooked during the pendency of Bloomgarden's habeas petition. I agree with the government that here, unlike in Pichardo, the purported failure to advance the collateral consequences claim "had no impact on whether the charges against [petitioner] were proper." Mem. In Opp. To Mot. To Reopen Section 2255 Pet. At 10 n*4. Nor did it impact "whether [petitioner's] truthful admission was accurate and appropriate to satisfy the charge to which he pleaded." Id. Furthermore, the only "dramatic change" is that California decided, nearly a decade after filing the capital complaint against Bloomgarden, to actively pursue that complaint, authorizing petitioner's case for the death penalty nearly 11 years after petitioner entered into his plea of guilty. These are factual changes that occurred years after this court disposed of petitioner's application for a habeas writ. Cf. Mickens v. U.S., 333 F. Supp. 2d 44, 48 (E.D.N.Y. 2004) (granting a Rule 60(b) evidentiary hearing regarding the denial of a habeas petition where new evidence, which the government denied existed during the pendency of the habeas petition, was discovered). Thus, petitioner's reliance on Pichardo is misplaced and cannot serve as the basis for granting his Rule 60(b)(b) motion.

2. The California Court's Ruling Cannot Serve as the Basis for Granting Rule 60(b)(6) Relief.

Next, Bloomgarden asserts that the extraordinary circumstances required by Rule 60(b)(6) are satisfied

because his habeas counsel's failure was "inordinately damaging." Pet. Mem. at 14. In support of this argument, petitioner notes: (1) that a "California trial court has subsequently found the claim meritorious;" (2) that he would not have entered into a guilty plea had he known his words could be used against him in a subsequent prosecution; and (3) that he now "faces lethal impeachment with his frail allocution – a *de facto* homicide confession – should he take the stand to try to save his life." Pet. Mem. at 14. This argument fails, however, because it does not support petitioner's conclusory assertion that his habeas counsel constructively abandoned his claim, the standard petitioner must meet to prevail on his Rule 60(b)(6) motion. Rather, in advancing this argument, petitioner asks this court to dilute the more exacting Rule 60(b)(6) standard pronounced in Harris with the less demanding Strickland analysis applied by the California court to his underlying claim of ineffective assistance of counsel. Petitioner cannot rely on law and facts relevant only to an ineffective assistance of counsel inquiry under Strickland to bootstrap the sufficiency of the showing he must make to warrant reconsideration, under Rule 60(b)(6), of the denial of his habeas petition.

The fact that a California court found petitioner's trial counsel constitutionally ineffective has no bearing upon whether or not his habeas counsel's performance was legally deficient.[4] Simply put, the

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[4] Had I reached the merits of petitioner's ineffective assistance of trial counsel claim, I am not confident that I would have reached the same conclusion as the California court. Applying

issue is not whether petitioner's underlying claim is or is not meritorious; before I am permitted to reach that issue, I must first conclude that habeas counsel constructively abandoned his habeas petition. The California court's hearing, legal conclusions and findings of fact, which did not focus on habeas counsel's purported failures, are irrelevant to this inquiry and certainly cannot themselves constitute the exceptional circumstances required by Harris.[5]

Strickland's two-pronged analysis, and assuming, *arguendo*, that petitioner satisfied the first prong, I am skeptical that I would have found prejudice. Petitioner testified at that hearing that he memorized the allocution based upon a written document given to him by his attorneys. Tr. 642. This testimony was corroborated by petitioner's own trial counsel, who testified that the allocution was crafted with the hope that it would satisfy California's double jeopardy law and forestall any future prosecution. Tr. 126. Petitioner even noted that his attorneys emphasized that he must read the written words provided exactly as written so that his allocution would assist him in any future double jeopardy argument. Tr. 642. Thus, petitioner was well aware that his allocution could have a real impact on any subsequent criminal proceedings. Indeed, his express purpose in allocating in that specific way - the way he now contends was a *de facto* confession - was to use those words as a sword against future prosecutions. Under these circumstances, it is some what disingenuous that petitioner seeks to rely on his purported ignorance regarding the potential impact of those words in another prosecution to invalidate his guilty plea.

[5] Similarly unpersuasive is petitioner's claim, assertedly supported by Johnson v. U.S., that his ineffective assistance of counsel argument is a "dead-bang" winner because another court has found it meritorious. Pet. Mem. at 16. First, because Johnson involved a habeas proceeding, the Second Circuit analyzed the petitioner's claim pursuant to Strickland, and not according to the more exacting Harris standard. This case is also unlike Johnson v. U.S. because that petitioner's ineffective

In sum, I agree with respondent that petitioner has not adduced any evidence to support his assertion that habeas counsel constructively abandoned Bloomgarden. Like the petition in Harris, because Bloomgarden's motion "failed in its attack on the integrity of [his] habeas proceeding," 367 F.3d at 82, his motion for reconsideration must be denied. Petitioner's remaining argument – his attack upon his guilty plea based on the purported ineffectiveness of his trial counsel – is beyond the scope of Rule 60(b) and cannot serve as the basis for granting petitioner's motion for reconsideration. See Gitten v. United States, 311 F.3d 529, 534 (2d Cir. 2002).

CONCLUSION

For the reasons stated above, the petitioner's motion under Rule 60(b)(6) to reopen his habeas corpus proceeding is denied. Because petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2) (1996), no certificate of appealability will be granted.

SO ORDERED.

s/ ARR
Allyne R. Ross
United States District Judge

Dated: July 16, 2009
Brooklyn, New York

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assistance of counsel claim was deemed a dead bang winner as it was predicated on an arithmetic error affecting sentence. 313 F.3d 815, 817-18 (2d Cir. 2002). There is no arithmetic error in this case. Dubbing petitioner's convoluted claim as a dead-bang winner based upon another trial court's complex determination that his Strickland claim was meritorious does not support his claim for Rule 12(b)(6) relief.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of April, two thousand and ten.

Before: Debra Ann Livingston,
Circuit Judge,
Kimba M. Wood,
District Judge.

Howard Bloomgarden,
Petitioner-Appellant,

v.

United States of America,
Respondent-Appellee.

ORDER
Dkt. No.
09-3853-pr

IT IS HEREBY ORDERED that the motion by *pro se* Appellant Bloomgarden to recall the mandate and for reconsideration/reconsideration *en banc* of the order denying Certificate of Appealability is DENIED.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk
s/

APPENDIX D

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE

STEVE COOLEY • District Attorney
JOHN K. SPILLANE • Chief Deputy District Attorney

CURTIS A. HAZELL
Assistant District Attorney

June 13, 2007

Marcia A. Morrissey, Esq.
2115 Main Street
Santa Monica, California 90405

Dear Ms. Morrissey:

In re *People v. Howard Bruce Bloomgarden,* Case No. BA 128564

The Special Circumstances Committee met today and discussed the appropriate penalty in your client's case. The District Attorney's Office will seek the death penalty for your client, Howard Bruce Bloomgarden.

Should new information arise which you believe might affect this penalty decision, please feel free to forward it in writing to me.

Very truly yours,
STEVE COOLEY
District Attorney

By /s/CURTIS A. HAZELL, Chairman
Special Circumstances Committee

jw

18-201 Clara Shortridge Foltz Criminal
Justice Center, 210 West Temple Street
Los Angeles, CA 90012
(213) 974-5959

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HOWARD BLOOMGARDEN, *Petitioner* *-against-*	99 CV 3676 (ARR) NOT FOR PUBLICATION
UNITED STATES OF AMERICA, *Respondent.*	OPINION AND ORDER

ROSS, United States District Judge:

On June 29, 1999,[1] Mr. Bloomgarden filed a petition to vacate his guilty plea pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the petition is denied.

BACKGROUND

On July 1, 1996, Mr. Bloomgarden pled guilty before me to conspiracy to distribute and possess with the intent to distribute marijuana, receipt of stolen art, conspiracy to use extortionate means to collect and attempt to collect an extension of credit, conspiracy to commit robbery, and travel in aid of

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[1] Although the petition formally was filed July 29, 1999, petitioner requested in his Memorandum in Support of Petition (Pursuant to 28 U.S.C. § 2255) to Vacate Conviction ("Mem. in Supp. of Pet.") that the court hold the petition in abeyance until he submitted a supplement to the memorandum including additional medical records. The petitioner, after requesting several significant extensions, filed only this supplement, notably without additional medical records, on April 26, 2001.

racketeering. On July 29, 1998, he was sentenced to a total of 405 months incarceration. During the allocution, he acknowledged that he obtained and distributed marijuana to various places throughout the United States, received stolen artwork that he knew to be stolen and worth more than $5,000, intended to assist an extortion, and was involved in a robbery conspiracy that he knew would involve actual or threatened force or violence. Plea Tr. at 23-28. He also acknowledged that he provided the financing for two kidnappings and "approved of" the murder of those kidnapped. Id at 28.

Although Mr. Bloomgarden timely filed a notice of appeal, the Second Circuit dismissed his appeal for failure to file a brief on December 23, 1998. Pet. At 3; Mem. in Supp. of Pet. at 3.

DISCUSSION

Mr. Bloomgarden raises two grounds for relief in his petition, and respondent opposes both claims. The court finds that neither claim has merit and will discuss each in turn.

I. Guilty Plea

Mr. Bloomgarden claims that he was denied "[his] Constitutional Right and rights provided by the American with Disabilities Act to be given necessary medication in prison to allow proper ability to function pre-trial and make an intelligent decision whether to plead guilty." Pet. at 5. Specifically, Mr. Bloomgarden says that the Bureau of Prisons

stopped giving him Ritalin for his diagnosed Attention Deficit Disorder ("ADD")[2] while he was incarcerated awaiting trial. As he stated in his affidavit, he "knew that at trial [he] would have to testify to have any chance at all and without Ritalin it would be a disaster because [his] mind would go all over the place due to the heavy pressure of the trial and cross examination. " Pet. Reply Mem. Exhibit A at 4. Because he feared his "ADHD behavior, [he] could not go to trial." Pet. at 5. As summarized by petitioner's attorney in his memorandum, Mr. Bloomgarden alleges that his

ADHD left untreated and uncontrolled, through no fault of his own, affected his ability to be able to concentrate and prepare during the pre-trial/pre-plea phase of the case and more importantly [that] it left him with the feeling that he had no choice but to plead guilty as he could not risk standing trial and testifying in his own defense when he knew that as a sufferer of ADHD his mind would wander and that he could not concentrate for long periods of time.

Suppl. Mem. in Support of Pet. at 2.

Petitioner's attorney argues that Mr. Bloomgarden's "guilty plea must be considered

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[2] Petitioner's submissions to the court at times refer to his condition as Attention Deficit/Hyperactivity Disorder, see Mem. in Supp. of Pet. at 1, and at other times as Attention Deficit Disorder, Pet. Reply Mem. at 6. The court will refer to his diagnosis as ADD in accord with the affidavit from his diagnosing doctor. Mem. in supp. of Pet. Exhibit J; Pet. Reply Mem. Exhibit E.

involuntary because it was induced by the gripping fear of an inability to concentrate and communicate thoughts at trial." Pet. Reply Mem. at 6. Respondent makes a persuasive argument that this claim is procedurally barred because petitioner failed to raise it on direct appeal and failed to show that there was cause for his failure to raise the issue on appeal and prejudice resulting from that failure, Campino v. United States, 968 F.2d 187, 190 (2d Cir. 1992); United States v. Frady, 456 U.S. 152 167-68 (1982); or that he is actually innocent, Murray v. Carrier, 477 U.S. 478, 485 (1986). Petitioner does not address respondent's argument;[3] rather, he acknowledges that his direct appeal was dismissed by the Second Circuit for failure to file a brief. Nor does Mr. Bloomgarden allege any cause or prejudice nor

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[3]While petitioner's attorney disputes whether petitioner's claims are procedurally barred, he consistently cites to cases dealing with ineffective assistance of counsel claims. See, e.g., Pet. Reply Mem. at 2-4. The court finds below, as argued by petitioner, that his ineffective assistance of counsel claim is not procedurally barred, but the petitioner's case law does not support extension of this finding to his guilty plea claim. Petitioner might have alleged that the procedural default should be excused because it is the result of his attorneys' mistakes. Attorney error may constitute "cause" excusing a procedural default if the error is so egregious that counsel's performance fails to satisfy the defendant's Sixth Amendment right to effective assistance of counsel. Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). Where the alleged cause for procedural default is attorney error, the standard is met only by establishing that counsel was constitutionally ineffective under the Strickland (Strickland v. Washington, 466 U.S. 668 (1984)) standard. Murray, 477 U.S. at 488. Because this court rejects petitioner's claim of ineffective assistance of counsel, however, see below, any such allegation of cause would fail.

actual innocence to excuse this apparent procedural default.

Even if petitioner's claim that his plea was involuntary is not procedurally defaulted, however, because nothing in the record alludes either to his ADD or the absence of Ritalin to treat the ADD, it is without merit. As recited by the Supreme Court, "[t]he longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 31 (1970)). The Second Circuit has summarized relevant factors:

> As a general matter, a plea is deemed "intelligent" if the accused had the advice of counsel and understood the consequences of his plea, even if only in a fairly rudimentary way; it is deemed "voluntary" if it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's sheer inability to weigh his options rationally.

Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988). The Court will uphold a guilty plea entered by a defendant "'fully aware of the direct consequences . . . unless induced by threats . . . , misrepresentation . . . , or perhaps by promises that are by their nature improper.'" Brady v. United States, 397 U.S. 742, 755 (1970) (internal citation omitted).

Petitioner seems to make two distinct arguments to support his claim of a plea, neither of which has any merit. First, he seems to make a traditional claim of depravation of his Ritalin caused him to be so confused that he was unable to make a decision whether to plead guilty or proceed to trial. Specifically, petitioner's attorney argues that Ritalin was "so necessary to control ADHD and bring his concentration skills to the level needed that he could function appropriately and effectively when faced with the highly electrified setting of a criminal indictment involving the most serious of offenses." Mem. in Supp. of Pet. at 1-2. The deprivation "left [him] with no other choice than to enter pleas of guilty." Id. at 2.

This claim is wholly conclusory, and the evidence submitted by the petitioner in this case fails to support his arguments. The documents might support the following findings of fact: that several doctors have diagnosed petitioner as suffering from ADD; that at least some doctors who evaluated petitioner believe that he should have received Ritalin or its generic form while incarcerated pending trial; that petitioner was taking Buspar the day of his sentencing; that Buspar is not as effective as Ritalin in achieving cognitive and emotional stability; that Buspar can be effective at combating nervousness and insomnia; and that Petitioner complained to prison medical authorities prior to his plea of guilty that he was having difficulty concentrating because he was not taking Ritalin and needed different medication to optimize his ability to prepare for trial. See Mem. in Supp. of Pet. Exhibits

B-J. There is no medical evidence in petitioner's exhibits, however, that suggests the causal nexus between deprivation of Ritalin and the inability to understand a plea of guilty that petitioner must demonstrate to warrant vacation of his plea as involuntary or unknowing. The strongest evidence to support petitioner's claim for relief is the letter of Dr. Her dated March 12, 1996 and addressed to Mr. Shargel. Dr. Levowitz reported Attention Deficit Disorder, Residual State and Dysthymic Disorder, and opined that

> [e]ssential to minimizing the disruptive effects of these conditions on him, and, effecting mood, occupational and cognitive rehabilitation is treatment with psychostimulant medication, i.e. **RITALIN** 10 mg (tablets 2 taken twice daily). Anxiolytic medications (Xanax 0.5 mg and Buspar 10 mg) are helpful to combat insomnia and nervousness, but not nearly as central as Ritalin is to gaining cognitive and emotional stabilization.

(Emphasis in original). Dr. Levowitz similarly states in his affidavit to the court that he prescribed Ritalin to the petitioner, and that "Ritalin is used in order to minimize the disruptive effects of this condition and allow a person such as HOWARD BLOOMGARDEN to function more normally with regards to cognitive reasoning and concentration." Pet. Reply Mem. Exhibit E ¶3-4 (emphasis in original). This expert opinion falls far short of a claim that lack of Ritalin

renders an individual incapable of understanding that nature of the charges or the plea process. The court concludes that petitioner had adduced no medical evidence that, if believed, would establish that the lack of Ritalin rendered Mr. Bloomgarden incapable of entering a knowing and voluntary plea.[4]

Further, Mr. Bloomgarden's claims of involuntariness are belied by his own testimony at his plea colloquy. The record of his allocution supports a finding that his plea was voluntary and knowing. In the Rule 11 inquiry, Mr. Bloomgarden was questioned regarding any medication he was currently taking, what effect, if any, these medications had on his ability to think, and whether he was under the care of a doctor. Plea Tr. at 3-5. These questions explored Mr. Bloomgarden's ability to understand his options and make a voluntary and knowing plea. Mr. Bloomgarden never indicated that he was too confused or distracted to make a knowing plea. Further, when he explained that he was under

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[4] Petitioner's reply to the respondent's memorandum in opposition to the petition references a letter from Dr. Feister to Mr. Shargel, dated January 9, 1997, in which Dr. Feister purportedly opined that Mr. Bloomgarden's "current medication regimen is not adequately controlling his symptoms [associated with his depressive episode] and may come, in fact, be [sic] causing serious adverse affects [sic]. He required further evaluation and more aggressive pharmacological treatment to manage his current symptoms." Pet. Reply Mem. At 6. It is not clear to the court how this letter is relevant to the instant petition in that it was written months after Mr. Bloomgarden pled guilty. Moreover, the medical opinion does not advance petitioner's claims because it relates to depression and does not question Mr. Bloomgarden's ability to enter a knowing and voluntary plea due to his ADD.

the care of a psychiatrist for depression and anxiety, he never indicated that the medications prescribed, Buspar and Diazepam, had failed to alleviate these symptoms. Id. at 3-4. To the contrary, Mr. Bloomgarden gave assurance that his mind was clear, and that he understood the charges against him, the plea agreement, the rights he was waiving by pleading guilty, and the possible sentences he faced on each count under the guidelines. Id. at 5-19. As respondent points out, during the allocution Mr. Bloomgarden was asked eight open-ended questions to which he provided accurate answers. Id. at 13-18. Illustrating his ability to concentrate at the plea is Mr. Bloomgarden's acknowledgement that he did not know what supervised release entailed. Id. at 13. Similarly, when asked the approximate amount of marijuana that he had distributed, Mr. Bloomgarden alertly responded, "I'm not positive." Id. at 23. The court finds, therefore, that rather than just "spit[ting] out what [he] had been told before," Pet. Reply Mem. Exhibit A at 2, Mr. Bloomgarden listened to the court's questions and answered honestly and astutely when he did not know the answer.

Such "[s]olemn declarations in open court carry a strong presumption of verity," Blackledge v. Allison, 431 U.S. 63 (1977), and "are generally treated as conclusive in the face of the defendant's later attempt to contradict them." Adames v. United States, 171 F.3d 723, 732 (2d Cir. 1999). Mr. Bloomgarden has presented the court with no reason to doubt the truth of the answers that he gave at his plea allocution. Nor does he claim that his attorney

told him to lie at the guilty plea or offer any other reasonable explanation of why he would have testified falsely at that time. Compare Marchibroda v. United States, 368 U.S. 487 (1962)(granting evidentiary hearing on petition in light of allegation that prosecutor admonished defendant not to tell his lawyer or the court about a sentencing agreement). While his affidavit asserts that, at his plea, he "just spit out" the answers that Mr. Shargel told him to say (and purportedly even wrote out for him) because it was so hard to concentrate, Pet. Reply Mem. Exhibit A at 2, 6, this claim is belied by his careful response to the court's questions. As discussed above petitioner did not rotely respond "yes" to the court's inquires but rather asked for clarification when he did not understand and retained highly specific information concerning his possible sentences.

Additionally, the court observed petitioner's demeanor at his allocution, a time during which he was not taking Ritalin. See Blackledge, 431 U.S. at 74 n. 4 (observing that the judge's recollection of the events at issue may enable [her] summarily to dismiss a § 2255 motion). At no time during the court's lengthy colloquy with petitioner did he appear confused, distracted, or coerced. To the contrary, petitioner, as detailed above, attentively listened to and answered the court's questions, provided cogent, alert, and careful responses to the court's questions, and calmly detailed the facts supporting his guilt, including his financing of the kidnapping and his approval of the murders.

Mr. Bloomgarden further argues in support of his claim of involuntariness that he was forced to plead guilty because he felt "trapped." Pet. Reply Mem. Exhibit A at 6. Specifically, he claims that although he wanted to testify, he feared his testimony absent the influence of Ritalin would be so confused that a jury would convict him, and without his testimony he had no choice but to plead guilty. This claim is patently baseless, as Mr. Bloomgarden does not even disclose what his testimony would have been had he testified. His failure to make a proffer is especially glaring given the overwhelming strength of the government's case, as discussed below, and his factual admissions of guilt at his allocution.

In sum, Mr. Bloomgarden has failed to adduce evidence to demonstrate this claim. No medical evidence supports the leap from the basic fact that Ritalin is used to treat some of the symptoms of ADD to the very different claim that, absent Ritalin, an individual with ADD is incapable of entering a knowing and voluntary plea. The court will not credit petitioner's self-diagnosis, especially in the face of petitioner's sworn statements at his allocution that his mind was clear and his plea was voluntary and knowing; the court's personal observations of petitioner's alert and careful state of mind at his allocution; counsel's personal, in depth interactions with petitioner that led him to conclude he was competent to enter a plea of guilty, Plea Tr. at 5-6; and petitioner's sworn factual admissions of guilt.

II. Ineffective Assistance of Counsel[5]

Mr. Bloomgarden alleges that he was denied effective assistance of counsel for two reasons: his counsel, although aware, failed to bring to the court's attention the fact that the Bureau of Prisons had denied Petitioner the Ritalin; and counsel did not advise him that his plea of guilty could be used against him in other jurisdictions.[6] Pet. at 5. As argued by counsel in his memorandum, after acknowledging that "he had excellent, highly qualified attorneys working on his behalf [Mr. Bloomgarden] . . . claims that they did not appreciate

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[5] In Douglas v. United States, 13. F.3d 43, 47 (2d Cir. 1993)(superseded by statute on other grounds, as noted in Triestman, 9 F.3d at 369 n. 8), the Second Circuit explained that "movants alleging ineffective assistance claims not brought on direct appeal [are] permitted to raise those claims in a § 2255 petition unless: (1) the movant was represented by new appellate counsel on direct appeal; and (2) the claim was based solely on the record developed at trial." Because neither exception applies in this case, it is proper for Mr. Bloomgarden to bring this claim in the instant § 2255 petition.

[6] Although petitioner raised this ground in his petition, he did not provide details as to this claim in his affidavit, nor did his attorney adduce any argument in his Memorandum in Support of the Petition or in his Reply Memorandum. Petitioner's attorney simply references this claim in footnote 8 of his Reply and urges the court to explore the claim in an evidentiary hearing. As discussed below, the petitioner is not entitled to an evidentiary hearing as of right, and it is not the court's responsibility to presume facts that, if proven, would warrant habeas relief. Although petitioner has had since July 29, 1999 to submit information to support this claim, he has failed even to identify its basis. The conclusory allegation does not warrant habeas relief, much less an evidentiary hearing.

the seriousness that the lack of medication had on his reasoning ability or the impact that the lack of medication had on his decision to enter pleas of guilty." Mem. in Support. of Pet. at 2. Specifically, counsel argues that Mr. Bloomgarden's attorneys should have informed the court prior to his plea that he had failed to receive his Ritalin. Mem. in Supp. of Pet. at 8.

In order to demonstrate ineffective assistance of counsel, the petitioner must satisfy the two prong test established in Strickland v. Washington, 466 U.S. 668 (1984); see also Hill, 474 U.S. at 58 (applying Strickland's two prong test to ineffective assistance of counsel claims arising out of the guilty plea process). Under Strickland, a petitioner must demonstrate, first, that trial counsel's performance was so deficient that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment [,]" 466 U.S. at 687, and, second, that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. To demonstrate the first, or "performance," prong of the Strickland inquiry, the petitioner must show that "there is a reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

Even if Mr. Bloomgarden could establish that his counsel's performance was deficient,[7] he cannot

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[7] In addressing the prejudice prong without discussing the performance prong, the court in no way intimates that it would have found Mr. Shargel's performance deficient. Rather, as the Supreme Court explained in establishing the Strickland

satisfy the second prong of the Strickland analysis because there exists no reasonable probability that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. The government had refused Mr. Bloomgarden's repeated attempts to cooperate because it found him to be "wholly untrustworthy." Mem. in Oppos. to Pet. at 3. As the respondent's memorandum and the Presentence Report detail, the evidence against Mr. Bloomgarden was overwhelming. Several cooperating witnesses would have testified, inter alia, that Mr. Bloomgarden had ordered the murders of Peter Kovach and Theodore Gould. Telephone records corroborated this proffered testimony by identifying a call placed the evening of the murders just prior to the murders from a payphone near where the petitioner was staying to

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standard, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." Strickland, 466 U.S. at 697; see also Slevin v. United States, No. 98 Civ. 0904, 1999 WL 54010, at *5 (S.D.N.Y. July 28, 1999)(stating that "courts may decide such claims by making only the second (prejudice) inquiry of the Strickland test"). Trial counsel is entitled to a "strong presumption" that his actions were within the acceptable range of professional conduct in order to combat the distortions of hindsight. Strickland, 466 U.S. at 689. If it is clear in reviewing a claim that the petitioner suffered no harm as a result of counsel's alleged error, a court may reject a claim without examining the performance prong. See id. at 697. The court has simply chosen this approach to petitioner's ineffective assistance claim. If it were to reach the performance prong, the court would likely find that the petitioner failed to demonstrate that his attorney's performance fell below an objective standard of reasonableness, for many of the same reasons detailed in respondent's opposition memorandum, Mem. in Oppos. to Pet. at 18-19, and discussed above.

the hotel where the murders took place. Additionally, there was evidence that the petitioner directed his accountant to destroy Western Union receipts that tied him to the murders. Rather than face a life sentence if convicted at trial, he pled guilty on the morning of jury selection.

Although petitioner maintains in his affidavit that he would have insisted on going to trial if he had received Ritalin for his ADD, Pet. Reply Mem. at 14 & Exhibit A at 4, 6, as discussed above, he fails to proffer what testimony he would have given that would have countered the government's mounting evidence of guilt. It is impossible to credit his unsupported allegation in the face of the government's case. See Key v. United States, 806 F.2d 133, 139 (7th Cir. 1986)("A mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice."). Rather the decision to plead guilty, thus avoiding a life sentence if convicted at trial, was rational and intelligent. The court concludes that the petitioner has not demonstrated that there is a reasonable probability that but for the alleged errors by counsel he would not have pled guilty, and therefore finds that Mr. Bloomgarden has failed to demonstrate prejudice.

III. Request for Evidentiary Hearing

Petitioner insists that he is entitled to an evidentiary hearing because he has made what he alleges to be at least a plausible claim of ineffective assistance of counsel. Petitioner correctly recites the

language of 28 U.S.C. § 2255, which states in relevant part that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Second Circuit case law is clear, however, that "[t]o warrant plenary presentation of evidence, the application must contain assertions of fact that a petitioner is in a position to establish by competent evidence." United States v. Aiello, 814 F.2d 109, 113 (2d Cir. 1987). The Supreme Court similarly acknowledged that petitioners bear some burden before the court must schedule an evidentiary hearing, finding that "[t]he subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge, 431 U.S. at 74. In essence, the petitioner must, similar to the summary judgment procedure in civil cases, produce some evidence that there is a genuine issue of material fact for the court to resolve at an evidentiary hearing. See id. at 80-81. Specifically, "the court looks primarily to the affidavit or other evidence proffered in support of the application in order to determine whether, if the evidence should be offered at a hearing, it would be admissible proof entitling the petitioner to relief." Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974). The Second Circuit has explained that "[w]hether there is a genuine issue of material fact depends upon the sufficiency of those factual allegations. Airy generalities, conclusory assertions and hearsay

statements will not suffice because none of these would be admissible evidence at a hearing." Aiello, 814 F.2d at 113-14. See also Seiller v. United States, 544 F.2d 554, 567-68 (2d Cir. 1975) ("No hearing was required unless evidentiary facts were alleged in such detail as to have raised sufficiently substantial issues to warrant a hearing. Mere conclusory assertions do not entitle a petitioner to a hearing.") (internal citation omitted). Cf. United States v. McGill, 11 F.3d 223, 226 (1st Cir. 1993) (finding that a "§ 2255 motion may be denied without a hearing as to those allegations which, if accepted as true, entitle the movant to no relief, or which need not be accepted as true because they state conclusions instead of facts, contradict the record, or are 'inherently incredible.'").

The petitioner has failed to satisfy his burden, and the court exercises its discretion to deny the petition without the need for an evidentiary hearing, see Dalli, 491 F.2d at 760. The affidavits suggest that petitioner would be able to prove that he has ADD and that Ritalin aids in gaining cognitive and emotional stability, see above, but the respondent does not challenge these factual assertions. Material to this case, as discussed above, is that petitioner's petition and supporting affidavits do not offer any evidence – other than Mr. Bloomgarden's self-interested conclusions – of a causal connection between the deprivation of Ritalin and petitioner's ability to make a knowing, intelligent, and voluntary plea. Moreover, there is no indication that petitioner would be able to prove such a causal link if the court were to schedule a hearing. The court finds,

therefore, that petitioner has failed to allege a genuine or material factual dispute that would warrant a hearing.

The cases to which petitioner cites further illustrate the deficiencies of his petition. For example, the Second Circuit in Aiello, 814 F.2d at 113, stated that a hearing is appropriate when a petition contains "assertions of fact that a petitioner is in a position to establish by competent evidence. As discussed above, the medical testimony falls far short of establishing the causal connection between Ritalin's absence and his ability to enter a knowing and voluntary plea. Sanders v. United States, 373 U.S. 1 (1963), similarly fails to advance petitioner's argument. Sanders is distinguishable on its facts from the present case because it concerned a claim that the petitioner had been under the influence of narcotics at the time of the plea. Unlike this case, the Court in Sanders was equipped to take judicial notice of the fact that narcotics might influence one's ability to reason and make a knowing and voluntary plea. Although the petitioner rhetorically suggests that it logically follows from Sanders that a defendant who needs a prescription drug to stay focused and testify is in a similar posture as the petitioner in Sanders, the court rejects this argument because, as stated above, the petitioner has not shown (as opposed to claimed) that he in fact needed Ritalin to be able to stay focused and testify.

Finally, petitioner's extended quotations from United States v. Burrows, 872 F.2d 915 (9th Cir. 1989), further demonstrate why his claims are

insufficient here to warrant an evidentiary hearing. Burrows is somewhat analogous to the instant case in that it dealt with the mental state of a defendant at a time when he was not under the influence of prescribed medication, there for schizophrenia. The case is distinguishable, however, in several ways, most important of which is the petitioner in Burrows proffered much more compelling and relevant information to warrant a hearing. Specifically, the petitioner submitted numerous affidavits, including one from his doctors who would testify that Burrows "would have probably suffered a relapse of his paranoid schizophrenia if he stopped taking the drugs, did not seek outpatient treatment or consumed excessive amounts of alcohol." Id. at 916, quoted in Pet. Reply Mem. at 16. Additionally, the petitioner in Burrows submitted several affidavits from friends to establish that he had become withdrawn and suffered memory loss and mood swings. Id. As discussed above, Mr. Bloomgarden proffers no medical evidence that he was in fact so confused that he could not make a knowing and voluntary plea nor any other evidence (other than his own conclusion) that he was incapable of entering a knowing and voluntary plea. The court finds from the record that petitioner has not demonstrated a genuine issue as to a material fact, thus a hearing is not required under the statute.

CONCLUSION

For the reasons stated above, the petition for a writ of habeas corpus is denied. Because Mr. Bloomgarden has failed to make a "substantial

showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2) (1996), no certificate of appealability will be granted. The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

Allyne R. Ross
United States District Judge

Dated: November 14, 2001
Brooklyn, New York